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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 1708

CHARLES RIVER CIVIC TELEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 1716

GREATER BOSTON TELEVISION CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–43a) [1] is not yet officially reported. The Federal Com-

[1] "Pet. App." refers to the separately bound Appendix in No. 1622, except that Pet. App. H appears at the back of the petition in No. 1622.

munications Commission's decision (Pet. App. 52a–79a) and its memorandum opinion and order modifying that decision in part (Pet. App. 306a–325a) are reported at 16 F.C.C. 2d 1 and 17 F.C.C. 2d 856, respectively. The initial decision of the hearing examiner (Pet. App. 80a–305a) is reported at 16 F.C.C. 2d 29.

Earlier court decisions connected with this case are *Greater Boston Television Corp.* v. *Federal Communications Commission,* 334 F. 2d 552 (C.A.D.C.) (Pet. App. 47a–51a); *Massachusetts Bay Telecasters* v. *Federal Communications Commission,* 295 F. 2d 131 (C.A.D.C.), certiorari denied, 366 U.S. 918, and *Massachusetts Bay Telecasters* v. *Federal Communications Commission,* 261 F. 2d 55 (C.A.D.C.). Earlier Commission decisions in this case are *WHDH, Inc.,* 1 Pike and Fischer R.R. 2d 468; *WHDH, Inc.,* 25 Pike and Fischer R.R. 78, 80; *WHDH, Inc.,* 33 F.C.C. 449 (Pet. App. 326a–344a); *WHDH, Inc.,* 29 F.C.C. 204.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1970 (Pet. App. 44a); petitions for rehearing were denied on February 16, 1971, (Pet. App. 44a); and the order of the court of appeals denying the motion of WHDH, Inc. to remand, denying various other motions, and granting WHDH a limited stay was entered April 15, 1971 (Pet. App. H1). The petition in No. 1622 was filed on April 23, 1971; that in No. 1708, on May 14, 1971; and that in No. 1716, on May 17, 1971. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

STATUTES AND REGULATIONS INVOLVED

Sections 307(d), 309(b) and 310(b) of the Communications Act of 1934 (48 Stat. 1083, 1085, and 1086, as amended, 47 U.S.C. 307(d), 309(b) and 310(b)) and pertinent provisions of the Rules and Regulations of the Federal Communications Commission (47 C.F.R. 1.533(a); 1.539 (a) and (d), and 73.34(a)(8)) are set forth at Pet. App. 383a–386a. Section 154(h) (48 Stat. 1066, as amended, 47 U.S.C. 154(h)) is set forth in the appendix to the petition in No. 1708 at p. 1a.

QUESTIONS PRESENTED

1. Whether there was a rational basis for the Federal Communications Commission's decision to consider an application for renewal of a television license on a comparative basis with other applications for the channel when the renewal applicant had been given only a limited license because of improper *ex parte* attempts to influence the Commission.

2. Whether the court of appeals affirmed the Commission's decision upon the same basis articulated by the agency.

3. Whether the Commission's decision was made by a statutory quorum.

4. Whether, in this case, the Commission correctly evaluated its comparative broadcast license factor relating to integration of ownership with management.

5. Whether the court of appeals adequately considered the appeal of Greater Boston Television Corporation from denial of its application for a license.

STATEMENT

In 1954 the Commission had before it for comparative consideration four mutually exclusive applications for a new television station on Channel 5 in Boston, Massachusetts. Among the applicants were WHDH, Inc. (petitioner in No. 1622), a subsidiary of the corporation which publishes a daily newspaper, the Boston Herald Traveler, and Greater Boston Television Corp. ("Greater Boston", petitioner in No. 1716). In April 1957, the Commission awarded the channel to WHDH, which began operation later that year (Pet. App. 4a).

While an appeal by Greater Boston and other disappointed applicants was pending, it came to the court's attention that the award might have been tainted by improper *ex parte* approaches to the Commision's Chairman. Retaining jurisdiction, the court remanded the case to the Commission for an evidentiary hearing on this issue.

The hearing, before a special examiner,[2] disclosed that Robert Choate, WHDH's principal, had arranged two luncheons with the Chairman: the first for the purpose of "sizing him up" and the second to urge him to support pending legislation which would restrict the Commission's policy of encouraging diversification of mass media. This policy was

[2] The Honorable Horace Stern, a former Justice of the Supreme Court of Pennsylvania.

a factor which could affect WHDH's pending application because of its newspaper affiliation. Rejecting its special examiner's recommendation that WHDH be exonerated, the Commission reported to the court that Mr. Choate had "demonstrated an attempted pattern of influence" in favor of WHDH, and that the "* * * attempt to establish such a pattern of influence does violence to the integrity of the Commission's process." *WHDH, Inc.*, 29 F.C.C. 204, 211, 212. The Commission proposed to vacate the original WHDH permit, grant special temporary operating authority that would allow WHDH to continue broadcasting, and reopen the entire proceeding for a new comparison of WHDH with the other applicants then before the Commission (Pet. App. 6a). The court approved and remanded. *Massachusetts Bay Telecasters Inc.* v. *Federal Communications Commission*, 295 F.2d 131, certiorari denied, 366 U.S. 918 (Pet. App. 6a).

At the conclusion of the reopened comparative hearing in 1962, the Commission awarded Channel 5 to WHDH, but it assessed a demerit against WHDH for Choate's improper conduct. Because, however, of "the inroads made by WHDH upon the rules governing fair and orderly adjudication," it granted only a special short-term license of four months instead of the normal three-year license. *WHDH, Inc.*, 33 F.C.C. 449, 454 (Pet. App. 331a).

Greater Boston and WHDH both appealed from this action by the Commission. In the meantime, on October 26, 1962 WHDH had filed for renewal of its

short-term license, and the Commission determined that the circumstances which had led to the short-term grant also constituted "compelling public interest considerations" warranting acceptance of competing applications for the channel. *WHDH, Inc.*, 25 Pike and Fischer R.R., 78, 80. Accordingly, on October 24, 1963, the Commission designated the WHDH application for comparative hearing with applications filed by Boston Broadcasters, Inc. ("BBI"), Charles River Civic Television, Inc. ("Charles River," petitioner in No. 1708) and Greater Boston TV Co. Inc.[3] *WHDH, Inc.*, 1 Pike and Fischer R.R. 2d 468, 472.

Then on December 21, 1963, Robert Choate died. On being informed, the court remanded the still pending appeals from the initial four-month grant, for consideration of the effect of Choate's death on that award as limited. It also authorized the Commission to combine issues in the remanded initial proceeding with the pending renewal proceedings (Pet. 49a–51a).

Both proceedings were in a comparative hearing status, but only WHDH and Greater Boston (see note 3, *supra*) remained in the initial proceeding (Pet. 83a–84a). After a lengthy hearing, an examiner made extensive findings of fact (Pet. 80a–303a). In the initial proceeding, he concluded that there were no material changes in WHDH as a result of Choate's death and that modification of the initial award would

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[3] The majority of the stockholders of Greater Boston TV, Co., Inc., had been stockholders in Greater Boston Television Corp., one of the original 1954 applicants for the channel which is the petitioner in No. 1716.

not serve the public interest (Pet. App. 55a, 259a–261a). In the renewal proceeding, he took note of the comparative factors set forth in the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393: past performance, diversity of media control, integration of ownership and management, and program proposals. He observed that under these standards WHDH would be downgraded in an initial licensing proceeding because in two respects, management-ownership integration and media diversity, it ranked well below its competitors (Pet. App. 297a). But relying on past Commission precedents,[4] the examiner ruled that these factors were not material on renewal (Pet. App. 301a) and that WHDH's satisfactory operating record entitled it to a significant degree of preference over competitors who could present only promises of future performance (Pet. 274a–275a; 298a). He recommended that WHDH's license be renewed.

On January 22, 1969, the Commission rejected the examiner's recommendation, and directed that Channel 5 be assigned to Boston Broadcasters, Inc. (BBI) (Pet. App. 52a–71a). Of the seven Commissioners, three did not participate, leaving a statutory quorum of four members. (47 U.S.C. 154(h).) Commissioners Bartley and Wadsworth joined in a written opinion rejecting WHDH and selecting BBI. (Pet. App. 52a–71a). Their opinion ranked WHDH below BBI and

[4] These cases held that a licensee seeking renewal is entitled to a significant preference over competing applicants because of past satisfactory operations.

Charles River in management-ownership integration and media diversity, which they found highly material; BBI was found to be superior to Charles River on integration, to have a slight edge in diversity, and to be about even on programming.[5] Commissioner Johnson concurred in a separate opinion indicating his agreement on the rejection of WHDH because of its newspaper affiliation; he stated that he lacked strong views as between the other two applicants, but joined in the choice between them for the purpose of constituting "a working majority for decision" (Pet. App. 78a). Commissioner Robert E. Lee dissented on the ground that WHDH's license should have been renewed under customary renewal criteria (Pet. App. 75a–78a).

The majority ruled that the examiner had erred when he gave a major preference to WHDH because of its prior operation on Channel 5 (Pet. App. 59a). It held that the 1965 *Policy Statement,* which was based on criteria not requiring new evidence in this proceeding, should govern the comparative evaluation (*ibid.*); under the *Policy Statement,* the Commission is to give weight to an applicant's past broadcasting record only if it is clearly superior or deficient (Pet. App. 60a). Since WHDH's record of past performance was only "within the bounds of average," it was not a factor entitled to weight in the comparative evaluation (Pet. App. 60a).

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[5] The fourth applicant in the renewal proceeding, Greater Boston TV Co., Inc., failed to meet preliminary noncomparative criteria in the estimation of both the Commission majority and the hearing examiner. See Pet. App. 269a; 58a.

In its opinion on reconsideration, adopted May 19, 1969 by the same three Commissioners who had made up the earlier majority (Pet. App. 306a), the Commission explained that its application of the 1965 *Policy Statement* to WHDH was due to the fact that WHDH, while technically a renewal applicant, was markedly different from regular renewal applicants. It stated (Pet. App. 322a–323a):

> * * * [W]e think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of three years. Thus, although WHDH has operated station WHDH–TV for nearly twelve years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular three-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of four months only because of the Commission's concern with the '* * * inroads made by WHDH upon the rules governing fair and orderly adjudication * * *.' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an Order directing that new applications for Channel 5 would be accepted within a specified two-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique

> events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license. (Pet. App. 322a–333a).

The Commission also made clear in this opinion that it agreed with the examiner's assessment of the effect of Choate's death and his conclusion that reevaluation and modification of the initial four-month award to WHDH would not serve the public interest (Pet. App. 315a–316a).

On appeals by WHDH, Charles River and Greater Boston, the court of appeals unanimously affirmed the Commission in an extensive opinion by Judge Leventhal (Pet. App. 1a–43a).

The court observed that the Commission had expressly put "this case in a special and unique category because of the past history of WHDH" (Pet. App. 24a). After reviewing this history, the court held that such special treatment was within the Commission's "reasonable latitude to keep its processes free of taint" when it found misconduct in Mr. Choate's *ex parte* contacts (Pet. App. 29a), and that the Commission's choice of remedial measures was "within the range of sound discretion" (Pet. App. 30a). It found procedurally fair the Commission's determination to apply its 1965 *Policy Statement* rather than the criteria used in ordinary renewal cases, because all parties were on notice as to the factors which would be considered in the comparative hearing (Pet. App. 31a). It was therefore appropriate for the Commission to use "the tainted overtures of WHDH as a reason for fresh consideration of all

applicants, without any special advantage to WHDH by virtue of its operation under lawful but temporary authority" (Pet. App. 31a).[6]

The court rejected Charles River's claim that less than a majority of a quorum effectively joined in the Commission's decision. It noted that the statutory four out of seven commissioners had participated; and that Commissioner Johnson had joined the significant decision on reconsideration without reservation as well as voting in favor of the original decision (Pet. App. 39a). It also ruled that, as between BBI and Charles River, the Commission had properly performed its responsibility in weighing the significance of the management-integration factor (Pet. App. 40a–43a).

Petitions for reconsideration were filed by WHDH and Greater Boston. The latter contended that its appeal from the initial decision had been overlooked. The court of appeals ruled that "after continuation of the careful study of the briefs and record that the oral argument showed was needful in view of the importance and complexity of the cases,"

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[6] The court noted the Commission's 1970 *Policy Statement on Comparative Hearings Involving Renewal Applicants*, 22 F.C.C. 2d 424 (Pet. App. 373). This Statement provides that, when in a comparative hearing an applicant for renewal of a license shows that its past performance has been substantially attuned to serving its area and is not otherwise deficient, its license will be renewed without further comparison. However, the court also noted that this Statement is expressly inapplicable to "those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant." (Pet. App. 26a, n. 35; 379a.)

no modification was warranted either of the result or the views set forth in the opinion[7] (Pet. App. 45a).

ARGUMENT

Essentially, the issue presented by this case is whether the Commission properly selected a licensee for a valuable television channel from among various competing applicants. The proceedings were unusually protracted because of WHDH's tainted overtures in connection with its original license application and the various administrative proceedings and judicial remands which resulted therefrom. The enormous record and the claims of the competing applicants have been thoroughly canvassed by the Commission and the court below. The petitions present no question of general importance, and there is therefore no reason for plenary review by this Court or for further delay in finally implementing the Commission's decision.[8]

1. WHDH's contention that the Commission has singled it out as the only renewal applicant ever to

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[7] Subsequent to the petition for rehearing, WHDH filed a motion in the court of appeals to remand the case to the Commission for reconsideration in the light of certain statements of Commissioner Wadsworth, published in Broadcasting Magazine after he left the Commission. The court of appeals entered a further opinion in the light of the Commission's denial on March 3, 1971, of WHDH's request that the Commission move for a remand for these reasons. The court was satisfied with the FCC's disposition of the matter and could see no warrant for reopening the case to probe the mental processes of a Commissioner. (Pet. App. H4–H9). No petitioner raises this matter here.

[8] WHDH continues to operate Channel 5 pending final disposition by this Court.

be denied renewal rights (Pet. 20) is without merit. It claims that because it received a four-month license in the initial contest, it is entitled to the significant preference which the Commission gives to ordinary renewal applicants. But the Commission made it very clear that it had never considered WHDH to be an ordinary licensee (Pet. App. 322a–323a). The original grant to WHDH was tainted because of its principal's improper attempt to exert influence on the Commission in behalf of WHDH, which led to "unique events and procedures * * * [placing] WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license" (Pet. App. 323a).

On the unique and special facts of this case, the Commission's treatment of WHDH equally with the other applicants was not only rational, but also consistent with precedent. An analogous case is *WKAT, Inc.* v. *Federal Communications Commission*, 296 F. 2d 375 (C.A.D.C.), certiorari denied, 368 U.S. 841. There, because certain parties had made improper approaches to the Commission, the court of appeals approved a full, comparative hearing without preference for a renewal applicant who, like WHDH, had received a special four-month license.[9] See also *Jacksonville Broadcasting Corp.* v. *Federal Communications Commission*, 348 F. 2d 75 (C.A.D.C.), certiorari

[9] In the *WKAT* case, unlike the case at bar, the licensee seeking renewal of its four-month license had been free of any taint. Yet the Commission, because of the unique circumstances, ordered a full comparative renewal hearing with no preference to the incumbent. *WKAT*, *supra*, at 383.

denied, 382 U.S. 893; *WORZ* v. *Federal Communications Commission,* 345 F. 2d 85 (C.A.D.C.), certiorari denied, 382 U.S. 893. Similarly, the 1970 *Renewal Policy Statement* [10] confers no benefits upon WHDH, for by its terms it applies only to "regular renewal applicants" (Pet. App. 373a); it makes express exception for infrequent cases, such as this, "* * * generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant" (Pet. App. 379a).[11]

WHDH would have the renewal of its license considered as if the original proceeding had been untainted, without regard to the continuing significance of the factors underlying the Commission's decision

[10] The *Renewal Policy Statement* is at issue in a group of consolidated cases now under submission in the court below *Citizens Communications Center* v. *Honorable Dean Burch*, No. 24,221; *Citizens Communications Center* v. *Federal Communications Commission and United States of America*, No. 24,471; and *Hampton Roads TV Corporation* v. *Federal Communications Commission*, No. 24,491.

[11] Contrary to petitioner's suggestion (Pet. 14), there is nothing in the *Renewal Policy Statement* which limits the "unusual cases" exception to cases in which a court has vacated a Commission award and the Commission has then provided for interim operation by a different party. Rather, the Commission's language makes it clear that, while "generally" these cases will involve court remands, at other times they will not.

Nor does it advance petitioner's claim to be a regular renewal applicant that in this case the Commission chose not to vacate the 1962 short-term license and provide for interim operation. Petitioner fails to recognize that the Commission stated that "* * * an interim operation here is inappropriate inasmuch as the further proceedings have run their course with the result that the renewal application of WHDH has been denied, and BBI's application has been granted" (Pet. App. 322a).

to limit the initial grant. But the Commission's powers to remedy "the inroads made by WHDH upon the rules governing fair and orderly adjudication" (Pet. App. 331a; 33 F.C.C. 2d at 454) were not exhausted by the limitation of WHDH to a temporary license. It had a responsibility to the public which, given the unusual history of this case, led it to keep all parties "as close as possible to a new application situation" (Pet. App. 35a). As the court of appeals observed (Pet. App. 35a):

> Hand crafted orders and procedures are particularly appropriate for unique fact situations. On the unique facts presented, WHDH was neither a new applicant nor a renewal applicant as those terms are generally construed. Since these orthodox classifications, and the rules generally pertaining to each, were not meaningfully available to the Commission on these facts, that body soundly formulated an intermediate position for the instant case.

2. WHDH's contention that the court of appeals upheld the Commission's action on grounds not relied on by the Commission (Pet. 21) is without foundation. The court focussed on the principal issue—the Commission's decision to put WHDH's case in a special and unique category because of its past history (Pet. App. 24a)—and it proceeded thoroughly to review that history in order to test the reasonableness of the Commission's action. The court had before it not only the appeals from the renewal proceeding but also the appeals from the remanded initial proceeding, and Choate's misconduct was a factor in the Com-

mission's decision to limit the initial grant to four months and to consider renewal in a comparative hearing in which all applicants were on an equal basis. Thus, while that misconduct was not a factor in the comparative evaluation on renewal, it was nevertheless central to the Commission's disposition of the case as a whole and the court properly considered and upheld the Commission's determinations on this subject (Pet. App. 30a). The court was called upon to do so by WHDH's contention that it was entitled to the preference enjoyed by an ordinary renewal licensee. The court re-examined the entire docket, including the proceeding before the court in 1963 (Pet. App. 27a) and each of the grounds asserted by the Commission for rejecting WHDH. The proceedings relating to the selection of a licensee for Channel 5 have been the subject of a continuous judicial oversight by the court of appeals for more than a decade. This most recent—and perhaps final—opinion reflects a careful and painstaking review in the light of a carefully articulated restatement of the principles which govern judicial review of administrative action (Pet. App. 15a, 22a). No more was required.[12]

3. Charles River, petitioner in No. 1708, argues that the decision of the Commission must be overturned because a quorum of the Commission did not partic-

[12] Petitioner does not challenge here the Commission's judgment that it was deficient in integration and diversification; it has not argued to this Court—or argued seriously to the court below (Pet. App. 23a)—that these deficiencies are insufficient reason to deny its application, so long as the Commission's treatment of it on an equal basis with its competitors was proper.

ipate in the decision—or at least in the comparison between Charles River and BBI—and because even if a quorum did participate the vote of Commissioner Johnson cannot be considered because it was cast simply to produce a working majority for decision. But as the Court below ruled (Pet. App. 39a): "The short answer is that four out of seven Commissioners constitutes a quorum [47 U.S.C. 154(h)]; that the Commission may act, assuming a quorum of four or more, by the vote of a majority of those present; [citing *WIBC, Inc.* v. *F.C.C.*, 259 F. 2d 941 (C.A.D.C.), certiorari denied, 358 U.S. 920] and that in this docket out of the four Commissioners casting votes three Commissioners cast their vote in favor of an award to BBI" (Pet. App. 39a). Cf. *Federal Trade Commission* v. *Flotill Products, Inc.*, 389 U.S. 179.

Commissioner Johnson's vote was not vitiated because it was candidly cast in order to avoid an impasse and to provide an effective order. "That is a perfectly sound reason for his vote, and one that involves neither stultification nor irrationality" (Pet. App. 39a). That Commissioner Johnson had no reservations about supporting the majority was made manifest, as the court noted, by his subsequent joining in the denial of Charles River's request for reconsideration (Pet. App. 316a–317a).

Agencies must, of course, give reasons for their determinations (5 U.S.C. 557(c)), and under *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, those reasons form the basis for judicial review of their action. But neither the requirement for

findings nor the "limited office"[13] of the *Chenery* principle prevents individual commissioners from casting their votes in favor of an articulated decision so as to make it possible for the agency to function.

4. Charles River also contends (Pet. 15–17) that the comparison between it and BBI was flawed in the weighing process. The Commission gave BBI a slight demerit on the ground that its programming proposals seemed exaggerated, yet gave BBI a strong preference on the important management-ownership integration factor. Charles River appears to contend that the basis for BBI's representations concerning its program plans was found to be inherently incredible and that the integration criterion is therefore meaningless because it is concerned only with the liklihood of effectuation of the proposed programming.

This contention misconceives the basis for the demerit. The good faith and reliability of the overall BBI program proposal were never in doubt; indeed the Commission specifically rejected a finding by the hearing examiner that the BBI local live program proposal "was flashed for its supposed value in a comparison" (Pet. App. 73a, exception 138; Pet. App. 288). The Commission concluded only that the record did not offer sufficient support for a rather ambitious undertaking in the area of local live programs and that a demerit in this area, cancelled out by a similar demerit to petitioner, precluded favoring either applicant on the basis of proposed programs. Evaluation of such matters is peculiarly a task for the Com-

[13] See *Penn-Central Merger Cases*, 389 U.S. 486, 519, n. 10.

mission, when, as here, its reasoning is indicated with clarity and its findings supported by the evidence (Pet. App. 40a–43a). See *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229; *WEBR, Inc.* v. *Federal Communications Commission*, 420 F.2d 158 (C.A.D.C.).

5. Petitioner Greater Boston, an unsuccessful applicant in the original comparative proceeding which culminated in the four-month WHDH grant, contends in No. 1716 that the entire renewal proceeding should never have been held because WHDH's original application should have been denied outright rather than granted for a four-month period. It argues that the court below has never passed on the appeal it brought from that award and that the case should be remanded for this purpose. But the court below did give full consideration to the claims of Greater Boston. Its opinion expressly states that the court had "reexamined the Commission docket that was before us in 1963 when we remanded for further proceedings" (Pet. App. 27a) and concluded that "the Commission stayed within the range of sound discretion" in awarding WHDH its four-month license (Pet. App. 30a). The Court noted that Greater Boston's contention before the Commission that WHDH should have been disqualified represented the opposite extreme from WHDH's contention that it should have received a regular full term license in 1962, and it found reasonable the Commission's selection of an approach "in between these extremes" (Pet. App. 32a). Greater Boston was free to par-

ticipate in the comparative renewal proceeding, and a majority of its stockholders did so in reorganized form, as Greater Boston TV Co., Inc. (see p. 6, *supra*). Noting the successor relationship between the two firms, the court stated "we see no grounds for concluding that this appellant had a right to confine the Commission to consideration on the basis of the original record and to resist a fresh, comparative hearing" (Pet. App. 43a, fn. 44).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WALKER B. COMEGYS,
Acting Assistant Attorney General.
HOWARD E. SHAPIRO,
ROBERT B. NICHOLSON,
Attorneys.

RICHARD E. WILEY,
General Counsel,
JOHN H. CONLIN,
Associate General Counsel,
KATRINA RENOUF,
Attorney,
Federal Communications Commission.

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